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SEXUAL ABUSE OFFENSES TESTIMONY

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POAG acknowledges the complexity involved in determining which guideline will best capture the conduct that new legislation is intended to address and fully account for the varied ways in which such an offense could be committed. Regarding Part A of this proposed amendment, POAG concurs with the proposed amendment to refer convictions under the newly enacted statute at 18 U.S.C. § 250 to USSG §2H1.1, particularly because the manner in which the base offense level underlying that guideline is structured. Specifically, under USSG §2H1.1, the base offense level provides an option to apply the offense level from the offense guideline applicable to any underlying offense. POAG notes that USSG §2H1.1 is specifically excluded from the grouping provisions under USSG §3D1.2 and is not subject to the expanded relevant conduct provisions pursuant to USSG §1B1.3(a)(2), which simplifies the determination of the applicable underlying offense to the conduct associated with the count of conviction. The penalty provisions under 18 U.S.C. § 250(b)(1) refer to conduct defined in 18 U.S.C. §§ 2241 and 2242, each of which correspond to USSG §2A3.1. The penalty provisions under 18 U.S.C. §§ 250(b)(2), (b)(4), (b)(5), and (b)(6) refer to conduct defined in 18 U.S.C. § 2244, each of which correspond to USSG §2A3.4. Application of either USSG §2A3.1 or USSG §2A3.4 provides specific offense characteristics that accomplish the goal of capturing the varied offense conduct pertaining to violations of 18 U.S.C. § 250.

However, the penalty provision under 18 U.S.C. § 250(b)(3) refers to conduct in which the offense involves a sexual act, as defined in 18 U.S.C. § 2246, without the other person's permission and does not amount to sexual abuse or aggravated sexual abuse. A violation of 18 U.S.C. § 250(b)(3)

is distinct from the other penalty provisions of that statute because it does not allege a specific underlying statutory offense given that 18 U.S.C. § 2246 is a definitions statute. As such, POAG believes that determining the applicable guideline for this penalty provision may not be as straight forward as it seems. POAG believes the underlying offense applicable to this subsection most closely aligns with conduct addressed under USSG §2A3.4. Therefore, POAG recommends commentary to include the applicable guideline when the penalty provision under 18 U.S.C. § 250(b)(3) applies. With this suggested commentary, when there is a conviction under 18 U.S.C. § 250, either USSG §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse) or USSG §2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact) will, therefore, apply. POAG believes the structure of the base offense level under USSG §2H1.1 allows the application of the guideline that is commensurate with the underlying offense. The flexibility of this approach is essential when the applicable statute criminalizes such a wide variety of conduct with a broad range of statutory penalties.

With regard to the newly enacted statutory penalty under 18 U.S.C. § 2243(c), which involves incidents in which a federal law enforcement officer knowingly engages in a sexual act with an individual under arrest, under supervision, in detention, or in Federal custody, POAG concurs that the applicable guideline for this offense should be USSG §2A3.3. POAG bases this recommendation on the fact that the offense conduct is comparable to the statutory provisions of 18 U.S.C. § 2243(b), which also references to USSG §2A3.3.

As currently written, USSG §2A3.3 results in a guideline range that would recommend a sentence of a few years of incarceration. This is in part because those who commit these types of offenses would need to have relatively minimal criminal histories in order to be hired into the positions that allowed them to commit the offense. POAG observed that a sentence of a few years did not adequately capture the seriousness of a sex offense that carries a statutory maximum penalty of 15 years imprisonment. Therefore, POAG believes amending the base offense level is necessary to account for the types of harm associated with these offenses. In cases where the conviction is under 18 U.S.C. § 2243(a) and involves a minor, the applicable guideline is USSG §2A3.2, which has a base offense level of 18. In cases where the conviction is under 18 U.S.C. § 2243(b) and the victim is an inmate or ward, the applicable guideline is USSG §2A3.3, which is also the recommended guideline for a violation of 18 U.S.C. § 2243(c). Presently, the base offense level under USSG §2A3.3 is 14. Ordinarily, punishments associated with child victims carry a higher penalty. These victims are vulnerable due to their age and the harms at such a developmental stage in their life have an ongoing ripple effect. However, POAG does not seek to distinguish the comparable severity of sexual acts with victims who are in custody, as they are similarly vulnerable given their custody status and the correctional officials assume a significant position of authority in relation to the inmate. The power differentials are similar and there is a comparable harm in the erosion of public faith in the justice system. Therefore, the majority of POAG recommends that a base offense level of 18 under USSG §2A3.3 be adopted, which is comparable to the base offense level under

USSG §2A3.2, with the understanding that relevant conduct will then account for any applicable mitigating or aggravating factors, depending on the facts and circumstances of the case.

The Commission solicited feedback on how to account for aggravating factors and whether the Commission should add specific offense characteristics to address aggravating factors. During POAG's discussion of this topic, we expressed concern about whether restraints were used, whether the victim was transported outside of the facility in which they were being housed, whether threats or coercive statements were made or a weapon used, and whether any degree of injury or pregnancy resulted. Some or all of these aggravating factors could be address by way of the cross reference and the applicable specific characteristics. POAG also discussed if Chapter Three enhancements would apply, including Vulnerable Victim under USSG §3A1.1, Restraint of Victim under USSG §3A1.3, and Abuse of Position of Trust under USSG §3B1.3, depending on the facts and circumstances of each case.

POAG also concurs that providing an option for a cross reference to USSG §2A3.1 if the offense involved criminal sexual abuse or attempt to commit criminal sexual abuse, including aggravating circumstances in which 18 U.S.C. § 2241(a) or (b) applies, whether the victim was in custody, and it also accounts for cases in which the victim suffered bodily injury. POAG notes that, in cases such as this, defendants could be charged and convicted of 18 U.S.C. § 2243(c), which carries a statutory maximum of up to 15 years, but could be held accountable by way of the cross reference to USSG §2A3.1 based upon relevant conduct for more serious conduct, such as that associated with violations of 18 U.S.C. § 2241. However, this type of scenario has also operated to benefit defendants in situations where the parties agree the defendant will plead to the lesser penalty under 18 U.S.C. § 2243(c), but agree they will be held accountable for the aggravating conduct under relevant conduct by way of the cross reference to USSG §2A3.1. In such instances, the guideline range can end up being capped at the lower statutory maximum.

Further, with regard to the proposed language regarding the cross reference at USSG §2A3.3(c), POAG notes that the narrative indicates "If the victim had not attained the age of 12 years, §2A3.1 shall apply, regardless of the 'consent' of the victim." POAG inquires if the same standard should apply for inmates who are in custody and subject to correctional authority.